APPENDIX "A"
California Probate Code
Sections 21350-21355

PART 3.5

Limitations on Transfers to Drafters and Others

[Added Stats 1993 ch 293 § 8 (AB 21).]

Section

21350. Limitations on transfers to drafters and others.
21351. Exemption prerequisites.
21352. Limitation on liability.
21353. Effect of failure of transfer.
21354. Statutory supremacy.
21355. Effective date.

§ 21350. Limitations on transfers to drafters and others. (a) Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following:

(1) A person, including an attorney, conservator, or other person having a fiduciary relationship with the transferor, who drafted, transcribed, or caused to be drafted or transcribed, the instrument.

(2) A person who is related by blood or marriage to, is a cohabitant with, or is an employee of, the person who drafted, transcribed, or caused to be drafted or transcribed, the instrument.

(3) Any partner or shareholder of any partnership or corporation in which any person described in paragraph (1) or (2) has a 10 percent or greater ownership interest,

and any employee of any such person, partnership, or corporation.

(b) For purposes of this part:

(1) "Disqualified person," means a person specified in paragraph (1), (2), or (3) of subdivision (a), but only in cases where Section 21351 does not apply.

(2) "Relative by blood or marriage" of a person means all of the following:

(A) The person's spouse or predeceased spouse.

(B) Relatives within the third degree of the person, of the person's spouse, and of any predeceased spouse of the person.

(C) The spouse of any person described in subparagraph (B).

In determining any relationship under this subdivision, Sections 6406, 6407, and 6408 shall be applicable. Added Stats 1993 ch 293 § 8 (AB 21).

§ 21351. Exemption prerequisites. Section 21350 does not apply if any of the following conditions are met:

(a) The transferor is related by blood or marriage to, or is a cohabitant with, the person who drafted, transcribed, or caused to be drafted or transcribed, the instrument.

(b) The instrument is reviewed by an attorney not related to, or associated with, the drafter or the beneficiary of the transfer otherwise made invalid under Section 21350 who (1) counsels the client (transferor) about the nature of his or her intended transfer and (2) signs and

delivers to the transferor and the drafter a certificate in substantially the following form:

"CERTIFICATE OF
INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)

_____ and counseled my client,
(name of instrument)

_____, on the nature of the transfer,
(name of client)

or transfers, of property contained in such instrument. On the basis of this counsel, I conclude that the transfer, or transfers, in such instrument that otherwise would be invalid under Section 21350 of the Probate Code are valid because such transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

_____ _____"
(Name of Attorney) (Date)

(c) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4. (d) The court determines, upon clear and convincing evidence, excluding the testimony of any person described in subdivision (a) of Section 21350, that (1) the transfer was not the product of fraud, menace, duress, or undue influence and (2) based upon all the facts and circumstances, which shall be made known to the court, the court finds that it is fair, just, and equitable to all interested persons to allow the transfer. If the court finds that the transfer was the product of fraud,

menace, duress, or undue influence, the disqualified person shall bear all costs of the proceeding, including attorney's fees. (e) Subdivision (d) shall apply only to instruments executed on or before July 1, 1993. Added Stats 1993 ch 293 § 8 (AB 21).

§ 21352. Limitation on liability. No person shall be liable for making any transfer pursuant to an instrument that is prohibited by this part unless that person has received actual notice of the possible invalidity of the transfer to the disqualified person under Section 21350 prior to making the transfer. A person who receives actual notice of the possible invalidity of a transfer prior to the transfer shall not be held liable for failing to make the transfer unless the validity of the transfer has been conclusively determined by a court. Added Stats 1993 ch 293 § 8 (AB 21).

§ 21353. Effect of failure of transfer. If a transfer fails under this part, the transfer shall be made as if the disqualified person predeceased the transferor without spouse or issue. Added Stats 1993 ch 293 § 8 (AB 21).

§ 21354. Statutory supremacy. This part applies notwithstanding a contrary provision in the instrument. Added Stats 1993 ch 293 § 8 (AB 21).

§ 21355. Effective date. This part shall apply to instruments that become irrevocable, or are executed by persons dying, on or after September 1, 1993. Added Stats 1993 ch 293 § 8 (AB 21).

APPENDIX "B"
"Due Process" Argument From Petition For Review In The California Supreme Court

Sup. Ct. No. P 718653

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

ESTATE OF SHELTON A. McHENRY, Deceased.	NO. BO 74070
EDWARD S. HALL and WILLIAM DEAN MILLS, Contestants and Appellants, v. THOMAS E. O'SULLIVAN and JOHN T. LYNCH, Defendants and Respondents.	

PETITION FOR REVIEW
OF DECISION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO

THOMAS J. JEFFERS, JR.
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Attorney for Appellants,
Edward S. Hall and
William Dean Mills

[Preceding Arguments Omitted]

* * *

those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and *void." Hampton v. Super. Ct.* (1952) 39 C 2d 652, 655-656, 242 P. 2d 1, 3: *Frankel v. Four Star Int'l Ind.* (1980) 104 CA 3d 897, 902, 163 CR 902; *Coffee-Rich, Inc., v. Fielder* (1975) 48 CA 3d 990, 998, 122 CAR 302. *Eisenberg, Horvitz and Wiener on Appeals.* Page 14-16

On Page 23 of the November 1991 Opinion, the Appellate Court stated, "Such exercise of undue influence by attorneys are especially egregious and thus *require the closest scrutiny."* Closest scrutiny should mean any evidence to show fraud in the procurement of the attestation of the will, not informing the client pursuant to the *Witt* case as well as the New York *Putnam* case. The Doctrine of "Law of the Case" holds that any ruling in an appellate court opinion that is "necessary" to the court's decision must be followed in all subsequent proceedings in the action, whether in the trial court or on a later appeal. *Clemente v. State of California* (1985) 40 C 3d 202, 211-212, 219 CR 445.

Here it appears that it is the law of the case that the court make the closest scrutiny of O'Sullivan's conduct. Neither the appellate court, nor the trial court did that.

ARGUMENT III

THE COURT DENIED PROCEDURAL DUE PROCESS

The court would not allow contestants sufficient time to prove their case and would not allow testimony that happened in 1986 and 1987, yet he allowed O'Sullivan to

go back to 1960 and produce earlier drawn wills. If fraud is involved, every year should be important. There was not time allowed for many important witnesses to show the fraud. The judge would not allow testimony of the forged initials on the will or testimony that one bequest of a $100,000.00 bond was actually paid with 20 - $5,000.00 bearer bonds which were not even inventoried in the estate, which meant that O'Sullivan was cheating the government as well as the true beneficiaries.

The trial court did not understand that O'Sullivan and Lynch were not the primary beneficiaries of the former wills, but were only alternate beneficiaries.

Once Bernice died, which was August 10, 1983, Mac became closer to his family and remembered them from early days and re-did his own will, keeping his family in mind. His family became very important to him.

There was no time in the trial to bring out that "Terry Gillard" was like a son to Mac. Every witness on the pretrial list had been told this by McHenry.

There was no time to bring out that his cousins, Archibald and Howard were really like brothers because Mac's father died when he was very young and he was raised by an uncle and aunt with these two cousins, who he often referred to as brothers.

McHenry had a 15 carat diamond ring he was going to leave to his wife, Ruth, whom he liked very much. Instead, O'Sullivan and Lynch ended up with it which is certainly contrary to anything the decedent would want (Query: Why would a businessman leave a woman's 15 carat diamond ring to two men to share?)

The case consisted of a race to put on a 10 day trial in two one-half days with the defense taking the entire two one-half days first alotted.

Fourteen people were prepared to testify that McHenry told them about his will and which items he was bequeathing to them. McHenry was not a blow-hard.

This is a case where a sophisticated attorney has gone bad. Where there are indications that the drafting attorney is engaged in fraud, the court should allow time for the closest scrutiny. The judge should not protect the perpetrator by attacking the contestants' attorneys. The court should have been patient and heard all of the testimony contestants wanted to put on.

The Appellate Court in their opinion stated in November of 1991 that the court should engage in the closest scrutiny. But they did not do it. Instead they limited the time and made it difficult for the contestants to prove even their basic case. Any testimony showing the relationship of McHenry, O'Sullivan and Lynch should have been allowed.

The contestants were entitled to procedural due process, in that they were entitled to a fair hearing, as mandated by the Constitution.

The court said in *In re Buchman's Estate* 123 Cal. App. 2d 546, 267 P. 2d 73, that "when the Constitution requires a hearing it requires a fair one before a tribunal which meets established standards of procedure, which is the fair, orderly, and deliberate method by which matters are litigated."

In this case Judge Ross did not allow sufficient time to try the case and therefore the matter should be sent back for a new trial.

Probate Policy No. 3:601(2) does provide that if a trial will take more than two afernoons it should be sent to Department 1.

It says:

"2. Other Contested Matters

When at issue, other contested matters with an estimated trial time of more than two afternoons will be set for a mandatory settlement conference in Department 5. If the matter cannot be completed in two afternoons, it will normally be transferred to Department 1 for trial. Before a matter is transferred to Department 1 all discovery and other law and motions must be completed."

CONCLUSION

The Appellants respectfully request that the Court accept this case for review, and refer this case back to the trial court for a full and adequate trial with sufficient time to bring out all of the facts and conduct that was not permitted, particularly where the attorney drafted the will placing himself as a principle beneficiary, executor, and in complete control of a blind, infirm client whose estate

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